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IN THE SUPREME COURT OF THE STATE OF DELAWARE

YATRA ONLINE, INC., Plaintiff-Below, Appellant, v. EBIX, INC., EBIXCASH TRAVELS, INC., REGIONS BANK, BMO HARRIS BANK, N.A., BBVA USA, FIFTH THIRD BANK, NATIONAL ASSOCIATION, KEYBANK NATIONAL ASSOCIATION, SILICON VALLEY BANK, CADENCE BANK, N.A., and TRUSTMARK NATIONAL BANK, Defendants-Below, Appellees.	No. 294, 2021 Court below: Court of Chancery of the State of Delaware C.A. No. 2020-0444-JRS

APPELLANT'S REPLY BRIEF

Dated: December 17, 2021

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PRELIMINARY STATEMENT[1]

Accusing a party of fraud is a serious thing. The Amended Complaint lays out an audacious fraud and bad faith of the worst sort. The story of this case is of a would-be buyer (Ebix) that cut a deal that quickly soured as the market moved against it. Rather than honor that deal, Ebix dissembled, prevaricated, and outright lied to lull its merger partner (Yatra) into inaction while it negotiated with its lending syndicate to make its own performance under the contract impossible. Then, having achieved its objective, Ebix reneged on various promises.

The gravamen of the lower court's opinion is that Yatra, the defrauded seller, was left with no remedy whatsoever. According to the trial court, Yatra's only recourse would have been to keep the Merger Agreement in full force, for the several years trial and appeal would have taken while suing for damages, subject to all of its covenant obligations like continuing to operate in the ordinary course, the prohibition against borrowing, etc. That is plainly not a "remedy" that any seller could afford to avail itself of and not what Yatra agreed to live with in this contract. Worse, the lower court's decision precludes Yatra from proceeding for fraud and tortious interference for the very reason (according to the trial court) that the Ebix's own conduct effectively rendered a fraud and interference remedy unavailable. And

[1] Unless indicated, emphasis and alterations are added, and internal quotations and citations are omitted. Capitalized terms not defined herein have the same meaning as in Appellant's Opening Brief, filed on November 2, 2021 (the "Op. Br.").

to make matters worse, the lower court's finding of first impression that a standard "best efforts" clause preempted an implied covenant claim likewise leaves Yatra without a remedy.

Ebix engaged in outrageous conduct. Yatra was clearly harmed. The Amended Complaint lays out several viable paths to recovery, and yet the trial court declined to credit any of them. Dismissing the case without discovery, the lower court effectively held that there was no set of facts alleged in the Amended Complaint which, if proven, could lead to recovery. Yet, appropriately viewed, the facts alleged in the Amended Complaint and their fair inferences, which should have been awarded to Yatra as the non-moving party, more than make out multiple claims.

Appellate courts play a crucial role in our system of jurisprudence. This is a case where this Court's role is especially vital. The idea that Yatra, a small Indian-based public company could be left with no remedy at law or equity – in the face of the most blatant fraud – offends the most basic notions of fairness and equity. For sure, Yatra must plead facts sufficient to be entitled to relief. But in dismissing all of Yatra's claims, the trial court took too narrow and cabined a view of the well pled facts. This Court should reverse.

ARGUMENT

I. LOSS CAUSATION WAS PROPERLY PLED AND MANDATES REVERSAL OF DISMISSAL OF BOTH THE FRAUD AND LENDER LIABILITY CLAIMS

Ebix challenges Yatra's appeal of the lower court's dismissal of Yatra's fraud and lender liability claims[2] based on alleged failure to pled "loss causation." Unable to address the argument directly, Ebix seeks to deflect attention, claiming that the point was not preserved below. Yet, the issue was properly preserved for appeal, and the lower court's dismissal on this ground fails to properly afford Yatra the reasonable inferences flowing from its factual allegations in the Amended Complaint.

A. Loss Causation Was Properly Pled

The lower court's analysis acknowledged that Yatra had alleged "but for Ebix's false promises . . . Yatra would have sued for specific performance of the Merger Agreement."[3] The trial court correctly cited the allegation at paragraph 188 of the Amended Complaint for that very proposition.[4] The court then disposed of this allegation, holding: "The problem with Yatra's theory is that specific

[2] *See* Counts IV and V of the Amended Complaint.

[3] Op. at 40.

[4] *Id*. at 40 n.140.

performance of the Merger Agreement was never an option in any event because, as Yatra affirmatively pleads, the SEC never declared the S-4 effective."[5]

While it is true that the SEC never declared the S-4 effective, and Yatra so pled, that fact ***does not*** dispose of loss causation. In its Opening Brief, Yatra pointed out that what it lost was ***not*** the right to force the Merger to close given that the S-4 was not effective – something that Yatra readily admits.[6] Instead, Yatra argued that its injury was that it was defrauded into giving up the right to force Ebix to ***take all steps*** necessary to be in a position to close the Merger in accordance with the terms of the Merger Agreement, *i.e.*, a decree of specific performance requiring that ***Ebix do what it promised to do in the contract.***[7]

Yatra alleged that Ebix's self-manufactured failure to clear outstanding SEC comment letters[8] – which Ebix promptly achieved right after this lawsuit was filed[9] – intentionally held up the SEC's declaring the S-4 effective. Hence, the Merger could have closed but for Ebix's failure to meet its obligations with respect to its own accounting shortcomings. Thus, the court below erred by focusing solely on whether of the lower court's chosen specific performance could be granted to ***force***

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[5] Op. at 41.

[6] Op. Br. at 43-45.

[7] *Id.*

[8] A197 ¶98.

[9] *Id*. ¶194.

the Merger to close. It admittedly could not, for the simple reason that in the ordinary course a state court has no power to force a federal regulator to exercise its discretion. But to understand a claim for specific performance so narrowly is error and deprives Yatra of all reasonable inferences from the facts pled in its complaint.[10]

Instead, if Yatra moved the court to enter relief requiring Ebix to take all steps necessary to clear its Comment Letters, Ebix demonstrably could have done so, and the Merger could have closed (at least before the Tenth Amendment was penned and Yatra stripped of its Put Right). Thus, Yatra's citation to *Engelhardt v. Fessia*[11] was not in the least "utterly irrelevant," as Ebix claims.[12] To the contrary, *Engelhardt* dealt with how a court could address claims for equitable relief where an outside agency presided over matters that the court lacked authority. There, the New York court ordered the party before it to take action to withdraw a filing before the Interstate Commerce Commission, since the Court had no authority over the ICC. So here, the Court of Chancery, lacking authority to order the SEC to declare the S-4 effective, could have ordered the party whose conduct was forestalling that

[10] *See Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001) (stating the standard for a motion to dismiss under Rule 12(b)(6)).

[11] 219 N.Y.S.2d 631 (N.Y. Sup. Ct. 1961).

[12] Appellee's Answering Brief on Appeal, filed on December 2, 2021 ("Ebix Br."), at 40.

effectiveness to do whatever was necessary to clear the Comment Letters, thus allowing the S-4 to become effective.[13]

It was that right to specific performance that Yatra lost by relying on Ebix's fraudulent promises of an equivalent renegotiation, and the lower court's failure to even consider this "lesser included" form of specific performance was error. Indeed, as demonstrated above, there are many forms a decree of specific performance could take. To myopically (and *sua sponte*, *see* footnote 19, *infra*) focus on only one form of such a remedy and then to effectively dismiss not one but two separate counts based almost entirely on the narrowest possible reading of the lost remedy is error. The lower court should have concluded that, while the ultimate remedy may not have been possible, another remedy was still available to Yatra at the point that it entered the renegotiations, and the loss of that form of remedy caused harm.

B. The Argument Was Preserved for Appeal

In its "loss causation" analysis, the lower court properly pointed to paragraph 188 of the Amended Complaint[14] which, in relevant part, reads:

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[13] That *Engelhardt* is a New York decision does not diminish its relevance to this action, given that the Court of Chancery undoubtably has the power to fashion a similar remedy. *See In re Oxbow Carbon LLC Unitholder Litig.*, 2018 WL 3655257, at *2 (Del. Ch. Aug. 1, 2018) ("The Court of Chancery has broad latitude to exercise its equitable powers to craft a remedy. The court's remedial powers are complete to fashion any form of equitable and monetary relief as may be appropriate and to grant such other relief as the facts of a particular case may dictate.").

[14] Op. at 40 n.140.

> [W]hile it negotiated the Tenth Amendment with the Agent Defendant and Lender Defendants and finalized its audit, Ebix intentionally dangled in bad faith revised terms before Yatra. In doing so, Ebix intended (and succeeded) in causing Yatra to delay terminating the Merger Agreement . . . and exercising its right to sue for specific performance, damages, and/or to terminate the Merger Agreement.[15]

Together with paragraphs 182, 220, 222, and 236 of the Amended Complaint, Yatra properly preserved its claim for appeal, contrary to Appellees' arguments.[16]

Appellees do not save this argument by saying that Yatra itself cut off the ability to seek specific performance by filing this litigation seeking damages and terminating the Merger Agreement.[17] It was ***Ebix's*** misconduct that caused Yatra to delay in seeking specific performance after which, as Yatra explains below, such a remedy was not practical.[18] Ebix cannot escape liability by arguing that a remedy is no longer available due to ***its own*** fraud.

Moreover, the essential point here flows from the lower court's narrow interpretation of "specific performance" and its failure to afford Yatra all reasonable inferences, including the inference that a cause of action seeking specific

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[15] A227 ¶188; *see also* A240 ¶236 ("The purpose of such promises was to cause Yatra to delay in exercising its rights, suing for specific performance, and/or declaring a breach.").

[16] *See* Ebix Br. at 42; Answering Brief of Appellees Regions Bank, BMO Harris Bank N.A., BBVA USA, Fifth Third Bank, National Association, KeyBank National Association, Silicon Valley Bank, Cadence Bank, N.A., and Trustmark National Bank, filed on December 2, 2021 ("Lender Br.), at 16-17.

[17] Ebix Br. at 42-43.

[18] A822-A823.

performance could have been different than an attempt to force a closing in the absence of a third party over which the lower court lacked authority or jurisdiction. Given that Yatra specifically alleged that Ebix sought to induce Yatra into forbearing from exercising its right to specific performance,[19] the point is clearly preserved. Thus, there could not have been a more specific preservation of the point for appeal, given that there was nothing to suggest that the lower court would take an unduly narrow reading of the loss actually alleged.[20]

C. Dismissal of the Lender Liability Claim Was Likewise in Error

The lower court dismissed the lender liability claim on the same basis on which it dismissed the fraud claim, *i.e.*, "even if the Tenth Amendment was never executed, specific performance would not have been a remedy available to Yatra."[21] The lower court continued: "For that reason, Yatra has failed to allege that the

[19] A236 ¶222.

[20] Neither Appellant nor Appellees briefed below the issue of an appropriate form of specific performance. *See Olsen v. T.A. Tyre Gen. Contractor, Inc.*, 907 A.2d 146 (Del. 2006) (TABLE) (reversing the trial court's determination that a liquidated damages clause was unenforceable as a penalty where the issue "was never fully litigated" and the "[f]ailure to afford the parties an opportunity to argue that legal issue was unjust, particularly because the trial court concluded that the owners had not met their burden of proving the clause's validity").

[21] Op. at 43-44.

Lender Defendants' entry into the Tenth Amendment was a 'significant factor' in causing the breach of the Merger Agreement."[22]

As Yatra argued in its Opening Brief, the lower court improperly conflated loss causation with the requirement of showing that the Lender Defendants' conduct was a "significant factor in causing" the harm. But even if the two are not distinguishable, it follows that since a "lesser included" form of specific performance ***was*** available to Yatra (*see supra*, at 5-6), and since the Amended Complaint expressly pleads that the SEC had determined not to otherwise review the S-4 once Ebix's accounting comments had been cleared,[23] a reasonable inference from the facts pled was that the Lender Defendants' entry into the Tenth Amendment ***was*** a "significant factor" in causing Ebix's breach in foreclosing the issuance of the Put Right. Thus, contrary to the Lender Defendants' protestations, their actions were a "significant factor" in causing Ebix's breach of the Merger Agreement (by contractually preventing Ebix from issuing the Put Right with the Tenth Amendment), and Yatra suffered injury (by being denied the possibility of specific performance, given Ebix's issuance of the Put Right would have caused an

[22] *Id*. at 44.

[23] Op. Br. at 46-47; A197 ¶98.

immediate event of default under the Credit Agreement).[24] Accordingly, Count V of the Amended Complaint should not have been dismissed.

D. Ebix Did Not Repudiate the Merger Agreement

The assertion that Ebix repudiated the Merger Agreement before it and the Lender Defendants executed the Tenth Amendment (dated May 7, 2020) runs headlong into the Extension Agreement (dated May 14, 2020), wherein Ebix affirmatively represents that "[w]ith the sole exception of the amendment to the Outside Date set forth in this letter agreement, the Merger Agreement *remains unchanged and continues in full force and effect.*"[25]

Moreover, "[t]he traditional rule with respect to repudiation is that when one party repudiates a contract, ***the non-repudiating party is discharged from its obligation to perform***, and can immediately seek damages for the repudiatory breach."[26] Even if Ebix repudiated the Merger Agreement,[27] such repudiation only affected ***Yatra's*** rights. Ebix was still bound by the contract and did not have *carte*

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[24] The Lender Defendants harp on the fact that they did not prevent the SEC from approving the S-4. Lender Br. at 14. This argument conveniently ignores their own action that was a "significant factor" in causing Ebix's breach of the Merger Agreement, *i.e.*, their knowing entry into the Tenth Amendment that deprived Yatra of the Put Right. Even if the SEC approved the S-4, the Tenth Amendment foreclosed the issuance of the Put Right.

[25] A161.

[26] *HIFN, Inc. v. Intel Corp.*, 2007 WL 1309376, at *16 (Del. Ch. May 2, 2007).

[27] The Amended Complaint contains ***no*** allegations that the Lender Defendants knew about Ebix's purported repudiation of the Merger Agreement.

blanche to continue breaching it, and the Lender Defendants were ***not*** privileged to interfere with the Merger Agreement.[28]

[28] The notion that Ebix repudiated the Merger Agreement, and therefore foreclosed the lender liability claim, is backwards. Any alleged repudiation, notwithstanding the language of the Extension Agreement to the contrary, only betrays the very interference Yatra seeks to address.

II. EBIX'S EXPRESS OBLIGATIONS UNDER THE MERGER AGREEMENT DO NOT PREEMPT THE COVENANT OF GOOD FAITH AND FAIR DEALING CLAIMS

The Court should reject Appellees' argument that Yatra's "implied covenant claims are entirely duplicative of its claims for breach of express contractual provisions."[29] Instead of confronting Yatra's arguments (and cases cited) in the Opening Brief, Appellees merely have regurgitated the Court of Chancery's ruling which, as further explained below, was in error.

There are at least two gaps in the Merger Agreement that the implied covenant of good faith and fair dealing fills, both of which Ebix breached while the Merger Agreement was still in full force and effect. First, without any intention to close a transaction, Ebix purported to renegotiate the terms of the Merger Agreement to induce Yatra to forebear from exercising remedies (the "Renegotiation Breach"). Second, and unbeknownst to Yatra, Ebix negotiated with the Lender Defendants and entered into the Tenth Amendment, which effectively prohibited Ebix from issuing the Put Right (the "Amendment Breach").

With respect to the Renegotiation Breach, the court below "erred by focusing too narrowly"[30] on the Merger Agreement's boilerplate "best efforts" provision,

[29] Ebix Br. at 37.

[30] *Dieckman v. Regency LP*, 155 A.3d 358, 367 (Del. 2017).

Section 6.5.[31] In particular, the express obligation to use best efforts to close the Merger ***does not occupy*** the contractual field, and it ***does not preempt*** a claim premised on an implicit prohibition on Ebix intentionally misleading Yatra to thwart its rights.[32] Rich jurisprudence supports holding that a defendant that actively undermines a contract can be held liable ***both*** for breaching a best efforts provision ***and*** the implied covenant.[33]

In response, Appellees cite – for the first time in this litigation – *Fortis Advisors LLC v. Dialog Semiconductor PLC*.[34] But that decision is entirely inapposite. *Fortis* involved a dispute over whether earn-out payments were owed to former stockholders of the seller following a merger.[35] The plaintiff alleged a breach of contract claim and, in the alternative, a breach of the implied covenant claim.[36] Crucially, however, the "plaintiff ***admit[ted] it does not believe that any gaps exist***

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[31] Op. at 34-35.

[32] *See* Op. Br. at 39-41; *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 443 (Del. Ch. 2012), *rev'd on other grounds*, 68 A.3d 665 (Del. 2013) ("Absent explicit anti-reliance language pursuant to which a sophisticated party knowingly assumes risk, a court can ***presume*** that the question '***Can I lie to you?***' would have been met with a resounding ***'No.'***").

[33] *See, e.g.*, *Liberty Prop. Ltd. P'ship v. 25 Mass. Ave. Prop. LLC*, 2008 WL 1746974, at *13 n.60 (Del. Ch. Apr. 7, 2008) (Strine, V.C.); *Rus, Inc. v. Bay Indus., Inc.*, 332 F.Supp.2d 302, 315 (S.D.N.Y. 2003).

[34] 2015 WL 401371 (Del. Ch. Jan. 30, 2015).

[35] *Id*. at 1.

[36] *Id*.

in the merger agreement from which to imply an additional contractual term," so the Court of Chancery dismissed the implied covenant claim.[37] Here, quite distinctly, Yatra has identified a (judicially accepted) gap in the Merger Agreement that Ebix breached.[38]

For similar reasons, the court below erred in holding that the Amendment Breach did not constitute a breach of the implied covenant. A breach of Ebix's express representation and warranty, as of signing and closing, that it was not in default of the Credit Agreement, is separate and apart from Ebix's violation of the implied covenant by intentionally stalling so it could not issue the Put Right as Merger consideration.[39] Put differently, it is one thing for Ebix to be in breach of representations and warranties about contractual defaults (and such breaches would be waivable by Yatra at closing).[40] It is entirely different for Ebix to purposefully enter into the Tenth Amendment so that it could not issue the Put Right, lest it would

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[37] *Id*.

[38] Appellees also cite *Matthews v. Laudameil*, 2012 WL 605589 (Del. Ch. Feb. 21, 2012), which likewise is unhelpful for them. There, the Court of Chancery dismissed an implied covenant counterclaim regarding a manager's failure to attend a board meeting where the LLC agreement imposed an express obligation to use best efforts to attend such meetings. *Id*. at *20. Appellees fail to explain how *Matthews* is at all relevant besides the fact that the LLC agreement there also contained a best-efforts provision. Ebix Br. 36.

[39] Op. at 41-42.

[40] *See* A085-A086 § 7.3.

incur an event of default under the Credit Agreement and seriously imperil Ebix's solvency. And, practically speaking, Yatra could not waive such a breach, given it would be illogical to close a stock-for-stock merger with a bankrupt company.

In response, Appellees merely quote the trial court's opinion and argue that there is no "daylight between a claim for breach of those provisions and of the implied covenant."[41] But, that argument misses the clear import of *Liberty Properties*, *Rus Industries*, and *ASB Allegiance Real Estate Fund*, *i.e.*, that the implied covenant imposed independent obligations that prohibited Ebix from ***actively undermining*** the deal.[42]

Unable to respond to Yatra's arguments and in a last gasp, Appellees suggest that the Court should affirm dismissal of the implied covenant claims because Yatra included them in the Amended Complaint but not the Original Complaint. Such an insinuation ignores that Yatra was entirely within its rights to amend its pleadings,[43] and Appellees did not (nor could they) argue that the claims were untimely.

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[41] Ebix Br. at 37.

[42] *Dieckman*, 115 A.3d at 367 (the implied covenant prohibits a counterparty from "act[ing] arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expected").

[43] Ct. Ch. R. 15(a).

III. THE TRIAL COURT IMPROPERLY IGNORED THE SEPARATE LEGAL OBLIGATIONS PRESENTED BY THE EXTENSION AGREEMENT

Appellees' arguments to avoid liability for breaching the Extension Agreement – like the lower court's decision – rest on two erroneous premises. First, they are mistaken than the Extension Agreement was a "writing delivered pursuant to" the Merger Agreement, such that the Extension Agreement is subject to the Merger Agreement's effect of termination provision.[44] Second, even if the Extension Agreement were subject to the Merger Agreement's effect of termination provision, Ebix could still face liability for breaches of the Extension Agreement because Yatra instituted this litigation prior to effective contractual termination.[45] Correcting either of these errors demonstrates that Yatra's breach of the Extension Agreement claim should not have been dismissed.

First, under Appellees' own definition, the Extension Agreement was not delivered "pursuant to" the Merger Agreement. Citing Black's Law Dictionary, Appellees defined "pursuant to" as "In compliance with; in accordance with; under, 2. As authorized by; under, 3. In carrying out."[46] Yet, the Extension Agreement was ***not*** executed for any of these purposes. Rather, Yatra agreed to maintain *status quo*

[44] Op. at 31; Ebix Br. at 30.

[45] Op. at 33; Ebix Br. at 32-33.

[46] Ebix Br. 30.

to facilitate the negotiation of a deal ***as an alternative*** to the one reached under the Merger Agreement (*e.g.*, Ebix must make its officers and legal counsel available for ***further diligence***; Ebix must deliver a ***revised*** certificate of designations; Ebix must ***negotiate*** in good faith).[47] And, crucially, the Extension Agreement imposed obligations on Ebix entirely absent from the Merger Agreement, like the requirement to propose $10 million in financing to fund Yatra's day-to-day operations.[48]

Appellees call Yatra's argument "nonsensical" because the "Merger Agreement expressly contemplates that the parties may need to 'extend the time for the performance of any of the obligations' under the Merger Agreement."[49] Yet, the myriad of additional obligations imposed by the Extension Agreement are entirely disconnected from the "obligations under the Merger Agreement." Rather, they are ***new and different*** obligations imposed to implement a structure for negotiating a ***new and different*** transaction. The extension of the Outside Date, as part of the Extension Agreement, was merely a byproduct of facilitating negotiations for a new deal.

Further, Appellees harp on the fact that the Extension Agreement (1) references the existence of the Merger Agreement and incorporates the Merger

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[47] A160-A161.

[48] A160.

[49] Ebix Br. at 30.

Agreement's defined terms and (2) provides that the Merger Agreement remains in full force and effect, and the parties reserved their rights thereunder.[50] Yet, as this Court observed:

> A mere reference in one agreement to another agreement, without more, does not incorporate the latter agreement into the former by reference. Rather, to incorporate one document into another, ***an explicit manifestation of intent is required***. In addition, when incorporated matter is referred to for a specific purpose only, ***it becomes a part of the contract for that purpose only, and should be treated as irrelevant for all other purposes***.[51]

Beyond the incorporation of defined terms, there is ***zero*** manifestation of intent for the Extension Agreement to incorporate additional provisions of the Merger Agreement. Indeed, the Extension Agreement expressly provides that it does not affect the rights of the parties under the Merger Agreement. Moreover, and key to the question of Ebix's potential liability, the Extension Agreement evidences ***no*** intent to incorporate the Merger Agreement's limitations on liability.[52]

Second, *arguendo*, even if the Extension Agreement was a "writing delivered pursuant to" the Merger Agreement, such that both were subject to the Merger Agreement's limitation on liability provisions, Ebix still faces liability for breaching

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[50] Ebix Br. at 31.

[51] *Town of Cheswold v. Cent. Del. Bus. Park*, 188 A.3d 810, 819 (Del. 2018).

[52] *See AB Stable VIII LLC v. Maps Hotels & Resorts LLC*, 2020 WL 7024929, at *102 (Del. Ch. Nov. 30, 2020) ("Absent a provision limiting remedies, 'all remedies, whether at common law, under statute, or under equitable principles, are cumulative.'").

both contracts. Although the court below did not decide the issue, as discussed in Section IV, *infra*, Yatra initiated this litigation ***before*** the effective termination of the Merger Agreement such that its pre-termination claims were preserved.

In response, Appellees cite – for the first time in this litigation – *In re Anthem-Cigna Merger Litigation*.[53] Yet, in its 311-page post-trial opinion, the *Anthem* court ***never*** decided whether the assertion of breach of contract claims prior to termination preserved those claims for post-termination litigation.[54] That is a question for this Court here and, as explained below, should be decided to preserve the possibility of Ebix's liability.

[53] 2020 WL 5106556 (Del. Ch. Aug. 31, 2020).

[54] Rather, the *Anthem* court adopted the framework to which the parties stipulated. *Id.* at *134.

IV. THE MERGER AGREEMENT DID NOT CUT OFF LIABILITY FOR BREACH OF CONTRACT

A. Section 8.2 Does Not Cut Off Ebix's Liability

Section 8.2 does not alter or eliminate Ebix's contractual liability for its breaches of the Merger Agreement but rather narrowly addresses the continued obligations of the parties under the Merger Agreement post-termination and the consequence thereof. Defendant's insistence that the provision in *AB Stable* is indistinguishable from the Merger Agreement is belied by the plain reading of the term "obligation" and the qualifier of "with respect thereto."[55] To ignore this qualifying language of Section 8.2, as the lower court did and as Appellees urge here,[56] would both make those words superfluous[57] and effectively leave Appellant with no remedy in contract.

As Yatra explained in its Opening Brief, the qualifier "with respect thereto" does real work – it provides that there shall be no continuing liability for Ebix's failure to live up to its contractual obligations following termination. It does ***not***

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[55] Ebix Br. at 20-21.

[56] Tellingly, when comparing the language from *AB Stable* and Section 8.2, Appellees emphasize certain similarities but entirely fail to address or explain away the phrase "with respect thereto" in Section 8.2.

[57] *See Council of Dorset Condo. Apartments v. Gordon*, 801 A.2d 1, 7 (Del. 2002) ("A court must interpret contractual provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole.").

extinguish a pre-existing lawsuit, filed prior to termination, seeking a remedy for past breaches of the Merger Agreement.

Appellees do not begin to explain the purpose of "with respect thereto" but rather obfuscates the argument by suggesting Yatra is attempting to present a new reading on appeal.[58] There is no new argument here. Section 8.2 is limited in its application by its very terms and does not displace the common law ability to pursue a party for a breach.[59] The phrase "with respect thereto" directs the application of Section 8.2 to the specific instances of contractual obligations and any liability that arises as a consequence of the parties being subject to the Merger Agreement – not an all-encompassing departure from the common law and avoidance of any liability for pre-termination breaches.

Finally, Appellees say that "contrary authority is readily available"[60] to Yatra's reading of Section 8.2, but that argument is belied by the very language that Appellees quote. In particular, Appellees cite the effect of termination provision in *Anthem*, which provides "[i]n the event of termination . . . the obligations of the parties under the Agreement shall terminate . . . ***and there shall be no liability on***

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[58] Ebix Br. at 22. Below, Yatra also argued that "with respect thereto" could be read to modify "any termination." (Op. at 22.) The lower court disagreed, and adopted a reading urged by Ebix that "with respect thereto" modified "obligations." Yatra's arguments here respond to that holding and explain why it is incorrect.

[59] *See* footnote 52, *supra*.

[60] Ebix Br. at 24.

the part of any party hereto."[61] Plainly, the emphasized language provides that, upon, termination, no parties to the *Anthem* contract will face liability. This language is similar to that in *AB Stable*.[62] Here, however, the court below found that the limiting language "with respect thereto" modifies "obligations," rather than the contract as a whole; thus, this provision must be read more narrowly than in *AB Stable* and *Anthem*.

B. Yatra Preserved The Ability to Seek Damages by Filing this Litigation Prior to the Effectiveness of the Termination of the Merger Agreement

Appellees entirely fail to address Yatra's argument that the court below erred in its holding that Yatra's initiation of this action prior to the effective termination of the Merger Agreement separately preserved Yatra's ability to recover damages from Ebix.[63] Appellant will not reiterate those arguments here.[64] Instead, Appellees pivot to the argument that Yatra purportedly terminated the Merger Agreement before it filed suit.[65]

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[61] Ebix Br. at 24.

[62] Ebix. Br. at 21.

[63] *See* Op. at 24 n.93.

[64] *See* Op. Br. at 24-26.

[65] Ebix Br. at 32.

As a preliminary matter, the court below ***did not*** rule on this "(disputed) contention."[66] Moreover, Appellees are simply wrong on this point. Yatra filed the Original Complaint at 4:04 p.m. ET on June 5, 2020.[67] Although Yatra sent the Termination Notice to Raina at 4:02 p.m. ET on June 5, 2020,[68] such notice could only become effective the ***next day at the earliest*** under the plain terms of the Merger Agreement. Under Section 9.2, any notice of termination must be in writing and, if sent by email, "shall be deemed duly given [] on the date of delivery . . . if sent prior to 5:00 p.m. (***local time of the recipient***)." Since Raina lives and works in India, he received the Termination Notice well after midnight, in the early morning hours of June 6, 2020.[69]

In fact, the Termination Notice became effective ***days after*** June 6, 2020. Under Section 9.2, email notices are only effective if there is a "confirmation of receipt by the recipient." Raina is Ebix's listed recipient under the Merger Agreement, but he never confirmed receipt of the Termination Notice.[70] There can

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[66] Op. at 24 n.93.

[67] *See* A1402.

[68] *See* A1399-A1400.

[69] India is 10.5 hours ahead of Eastern Standard Time. *See State v. Grinnage*, 2017 WL 1201160, at *4 (Del. Com. Pl. Mar. 16, 2017) (taking judicial notice of daylight savings time).

[70] The Merger Agreement requests any notices sent to Ebix also to be sent to its counsel, but the Merger Agreement makes clear that any copies sent to Ebix's counsel "shall not constitute notice" to Ebix. A089-A091 § 9.2.

be no dispute that this litigation was instituted prior to the effectiveness of the Termination Notice.

C. Additional Provisions of the Merger Agreement Support Yatra's Reading of Section 8.2

Neither are Sections 9.1 and 9.9(c) irrelevant here, as Appellees contend; rather, they illustrate the parties' ability to pursue an action for money damages irrespective of the parties' right to terminate the Merger Agreement or any obligations therein, or the timing thereof – which negates the lower court's reading of Section 8.2 and the argument that the parties intended to preclude "any liability" for prior breaches post-termination.

As Yatra highlighted in its Opening Brief, the lower court erred in holding that Section 9.9(c) compelled Yatra to choose between terminating the Merger Agreement or pursuing other remedies.[71] Plainly, the more natural reading of the "or" in the provision is the inclusive, rather than exclusive, form of the disjunctive.[72] Indeed, the exclusive form of the disjunctive makes no sense here – the "commencement of any Proceeding" could not mean that Yatra had to make a choice between ***either*** the termination of the Merger Agreement (which, according to the

[71] Op. Br. at 28-30.

[72] *See Gonzalez v. State*, 207 A.3d 147, 155 n.41 (Del. 2019) ("To say that 'or' is 'disjunctive' is true enough. But authorities agree that a disjunctive connector can have either an 'inclusive' or an 'exclusive' sense. Thus, 'A or B' can mean one or the other, but not both. But it can also mean one or the other, or both.").

court below, would eliminate all other remedies, rendering the commencement of a Proceeding superfluous) ***or*** the pursuit of any other remedies. Appellees entirely failed to address this argument.

Likewise, the survival clause of Section 9.1 does not impair Yatra's ability to sue for prior breaches or breaches of the Extension Agreement. The lower court's narrow reading and reliance on *GRT* is in error because the holding of that case temporally applies to post-closing situations, not pre-closing breaches that deny Yatra the benefits of its bargained for Merger. As Yatra explained in its Opening Brief (and as Appellees have failed to address in their briefs), there are clear differences between the post-closing and the post-termination contexts, and policy considerations support the preservation of Yatra's ability to hold Ebix accountable for its pre-termination breaches.[73]

[73] Op. Br. at 32-33.

CONCLUSION

The motion to dismiss opinion should be reversed.

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